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In the Supreme Court of the United States

OCTOBER TERM, 1978

KAISER ALUMINUM & CHEMICAL CORPORATION, PETITIONER

v.

**UNITED STATES CONSUMER PRODUCT SAFETY
COMMISSION, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 574 F. 2d 178. The principal opinion of the district court (Pet. App. 1c-10c) is reported at 428 F. Supp. 177. An earlier opinion of the district court (Pet. App. 1d-34d) is reported at 414 F.Supp. 1047.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2b) was entered on March 27, 1978. The petition for a writ of certiorari was filed on June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether aluminum branch circuit wiring is a "consumer product" within the meaning of the Consumer Product Safety Act.

STATEMENT

In November 1973 the Consumer Product Safety Commission ("Commission") began an investigation into the safety of residential electrical wiring systems using aluminum conductors, following reports of house fires alleged to have been caused by overheating of aluminum conductors. After holding hearings and receiving reports of studies conducted by the National Bureau of Standards, the Commission determined that aluminum wire of gauge 10 and smaller presented an unreasonable risk of injury to consumers through overheating and subsequent risk of fire, and it issued a notice of proposed rulemaking under Section 7(b) of the Consumer Product Safety Act, 86 Stat. 1213, as amended, 15 U.S.C. 2056(b), to establish standards for aluminum wire and devices.¹

Petitioner, a manufacturer and distributor of aluminum branch circuit wire, brought this suit in the United States District Court for the District of Delaware to enjoin the Commission from disseminating information about the hazards of aluminum wire and to require the Commission to retract statements it had previously issued. Petitioner alleged that the Commission had no authority to release such information because aluminum wire is not a "consumer product" within the meaning of the Consumer Product Safety Act ("Act").²

The district court, after trial, held (Pet. App. 1c-10c) that the Commission does not have jurisdiction over

¹40 Fed. Reg. 51218.

²The district court severed this jurisdictional claim for immediate trial after denying petitioner's motion for a preliminary injunction and the Commission's motion to dismiss (Pet. App. D).

aluminum branch circuit wiring and wiring systems because, by restricting the Act to those products used "in or around" a home, "Congress has affirmatively expressed its intention that this type of housing regulation remain in the class of police powers reserved to the States * * *" (Pet. App. 10c).

The court of appeals reversed (Pet. App. 1a-10a). It found that branch circuit wiring fits within the plain language of the Act, which defines a consumer product as "an 'article', or component part thereof, produced or distributed * * * for the personal use * * * or enjoyment of a consumer in or around a * * * household or residence" (Pet. App. 5a). Moreover, the court found "persuasive evidence" in the legislative history to support the view that aluminum wiring is included within the Act's coverage (Pet. App. 9a-10a).

ARGUMENT

The decision of the court of appeals is correct. This decision of first impression does not conflict with any decision of this Court or any other court of appeals, and in the absence of a conflict concerning the scope of the Commission's powers there is no reason for review by this Court.

1. The court of appeals properly concluded that the plain language of the Consumer Product Safety Act gives the Commission authority to call public attention to the dangers of aluminum wiring. Such wiring is a "consumer product" within the statutory definition, *i.e.*, an " 'article' * * * produced or distributed * * * for the personal use * * * or enjoyment of a consumer in or around a * * * household or residence' * * *." As the court of appeals stated, "[N]othing in the plain language of the Act suggest[s] that the word 'article', a noun denoting any material thing, excludes components incorporated in a residence if they otherwise fit within the definition" (Pet. App. 5a-6a).

Wiring and wiring systems plainly are "used in" a household or residence every time a light switch or an appliance is turned on,³ and the wiring is no less "in" a home because it is embedded in the walls.

2. Because aluminum branch circuit wire is within the plain meaning of the statutory definition of consumer products and is not among the categories of products specifically excluded from the Act's coverage (15 U.S.C. 2052(a)(1)(A)-(I)),⁴ it should be held to be a consumer product unless Congress clearly intended to exclude it from the Act's reach. See *United States v. Bisceglia*, 420 U.S. 141, 150; *United States v. American Trucking Associations*, 310 U.S. 534, 543-544. That is not the case here. In fact, as the court of appeals found, the legislative history provides "persuasive evidence" that Congress intended the Act to include articles such as aluminum wire (Pet. App. 9a).

In the first place, the Act had its origins in the work of the National Commission on Product Safety, which was created by Congress in 1967 to identify categories of

³Electrical wiring and devices conduct electrical current. As the court of appeals noted (Pet. App. 6a), electrical appliances could not function without the wire and the current. Moreover, the wiring is easily accessible to consumers at wall outlets and switches; consumers personally handle the wiring system and its components when installing light fixtures, adding new electrical receptacles, or installing new circuits to existing junction boxes.

⁴Both the district court and the court of appeals properly rejected petitioner's argument that aluminum branch circuit wiring falls within the so-called "industrial exclusion" to the statute, 15 U.S.C. 2052(a)(1)(A) (Pet. App. 6a-8a; 3c-6c). Branch circuit wiring (either copper or aluminum) is or has been sold directly to consumers by the nation's largest retailer, Sears, Roebuck and Co., the nation's largest retailer of building supplies, Wickes Lumber, and others (Pet. App. 4c-6c and nn. 5-11).

unsafe and unregulated household products.⁵ That Commission's final report⁶ listed approximately 350 largely unregulated "consumer products," including "electrical outlets, built-in wiring devices, and distribution systems." Final Report of the National Commission in Product Safety, p. 90 (June 1970).

In the House floor debates on the Consumer Product Safety Act, Representative Moss, the subcommittee chairman, specifically cited aluminum wiring as a matter of concern:

Should any member think that the list of hazards compiled by the [National Commission on Product Safety] was a final and exhaustive list, I would recommend that he carefully read the hearings of the subcommittee on this legislation. Very serious questions were raised concerning the safety of many products not investigated by the Commission, such as children's minibikes, aluminum home wiring and synthetic football turf.

118 Cong. Rec. 31378 (1972)⁷

Legislation enacted after the court of appeals' decision confirms that it correctly read the Act. On July 11, 1978, Congress amended the Act to require the Commission to

⁵81 Stat. 466, 467.

⁶Reprinted in Hearings on H.R. 8110, H.R. 8157, H.R. 260 (and identical bills), H.R. 3813 (and identical bills) before the House Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess. 319 (pt. 2) (1972).

⁷The Act is a broad remedial statute, intended to rectify the previous piecemeal approach to product safety legislation. *E.g.*, 118 Cong. Rec. 21851, 31375 (1972); S. Rep. No. 92-749, 92d Cong., 2d Sess. 12 (1972); S. Rep. No. 92-835, 92d Cong., 2d Sess. 7 (1972).

The Committee Reports demonstrate that the definition of "consumer product" is to be interpreted broadly. S. Rep. No. 92-749, 92d Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 27 (1972).

adopt an emergency interim safety standard for cellulose home insulation because of the fire and corrosion hazards it poses.⁸ The House Report on this amendment stated that the Commission "presently has the authority to promulgate a mandatory safety rule for home insulation." H.R. Rep. No. 95-1116, 95th Cong., 2d Sess. 3 (1978). See also 124 Cong. Rec. H3980 (daily ed. May 16, 1978), 124 Cong. Rec. S10131 (daily ed. June 29, 1978). Because insulation, like aluminum wire, is sold to consumers for their use as well as installed inside the walls of a house as an integral part of a house, the 1978 amendment and its legislative history refute petitioner's contention (Pet. 5-6) that housing and building materials are beyond the Act's scope.⁹ The recent legislation confirms the basis on which Congress acted in 1972, and it therefore has considerable significance. See *Califano v. Sanders*, 430 U.S. 99; *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 267.

⁸Emergency Interim Consumer Product Safety Standard Act of 1978, Pub. L. 95319, 92 Stat. 386.

⁹The single portion of the Act's history to which petitioner points for support of its position that aluminum wire is not a consumer product is the debate on the Eagleton amendment, an unsuccessful attempt to include mobile homes within the Act's coverage (Pet. 7-10). Petitioner fails to note that, in explaining its intent to exclude mobile homes from the Act's coverage (Pet. 9), the House Committee Report states that "the definition of the term 'consumer product' would include any component, equipment, or appliance sold with or used in or around a mobile home." H.R. Rep. 92-1153, 92d Cong., 2d Sess. 28 (1972).

Petitioner also focuses on subsequently enacted, unrelated legislation, which has no bearing on the issue presented here (Pet. 10-13). The fact that other legislation has created advisory bodies in the area of housing (Pet. 10-11) and fire prevention (Pet. 11) does not diminish the Commission's authority over consumer products used in or around the household. The definition of "consumer product" in the Magnuson-Moss Warranty Act (Pet. 12) also has no bearing on the Consumer Product Safety Act. In any event, the Federal Trade Commission, which administers the Warranty Act, has announced that products such as wiring which go into the construction of a dwelling are consumer products when sold by retailers. 42 Fed. Reg. 36115.

3. The court of appeals' decision is consistent with the only other decisions addressing the Commission's authority to regulate aluminum branch circuit wire. See *United States v. Anaconda Co.*, 445 F. Supp. 486 (D. D.C.), appeal pending, C.A. D.C., No. 77-1628 (*Anaconda I*), and *Consumer Product Safety Commission v. Anaconda Co.*, 445 F. Supp. 498 (D. D.C.), appeal pending, C.A. D.C., Nos. 78-1054, 78-1070 (*Anaconda II*) (argued May 5, 1978).¹⁰ Moreover, the Commission's interpretation of the Act it administers was adopted only one year after the passage of the Act. As an essentially contemporaneous construction of the statute, which Congress has recently endorsed (see pages 5-6, *supra*), it is entitled to great deference. *Zenith Radio Corp. v. United States*, No. 77-539, decided June 21, 1978, slip op. 6-7.

4. Contrary to petitioner's contention (Pet. 5), the decision below raises no issue of federalism. As the court of appeals properly concluded (Pet. App. 8a), petitioner's assertion that Congress intended to defer to state and local authorities on all matters of building materials and design of housing components is at odds with Sections 26(a) and 2(a)(4) of the Act, 15 U.S.C. 2075(a) and 2051(a)(4). In those Sections, Congress declared that existing state regulation was inadequate and that federal consumer product safety standards should preempt conflicting local regulations. Thus, Congress was aware of the extent to which it might enter into areas previously regulated by the states. Petitioner does not dispute congressional authority to do so, and in fact suggests that

¹⁰There is no reason to defer consideration of this petition pending the outcome of the appeals in the *Anaconda* cases, as petitioner suggests (Pet. 20). If the court of appeals' decisions in those cases conflict with the result here, and if that conflict is not resolved by this Court, there will be time enough for petitioner to raise its collateral estoppel arguments before the district court on remand of those cases.

agencies with such a mandate already exist (Pet. 6).¹¹ Because one of the purposes of the Act is "to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations," 15 U.S.C. 2051(b)(3), petitioner's contention that the Commission's actions disrupt federal-state relations is insubstantial. Cf. *United States v. Culbert*, No. 77-142, decided March 28, 1978, slip op. 9.¹²

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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¹¹To the extent petitioner attacks the Commission's ability to regulate consumer products, including aluminum wiring, it is simply expressing disagreement with the wisdom of the legislative plan, and its proper recourse is to seek an amendment to the Act.

¹²In denying the Commission's motion to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted (Pet. App. 1d-23d), the district court held that it had jurisdiction under 28 U.S.C. 1331 and 1337 (*id.* at 11d and n. 19), and that dismissal would be inappropriate (*id.* at 19d-22d). The Commission does not concede that these decisions were correct and, if this Court grants the petition for certiorari, the Commission will argue that they were wrong. See *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8.